United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7534

To be argued by:
CARL F. LODES

United States Court of Appeals
FOR THE SECOND CIRCUIT

LORRAINE BERMAN,

Plaintiff-Appellant,

against

CARL A. VERGARI, DISTRICT ATTORNEY OF WESTCHESTER COUNTY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

CARL A. VERGARI
District Attorney of Westchester County
Office and Post Office Address
County Courthouse
111 Grove Street
White Plains, New York 10601
(914) 682-2161

By: CARL F. LODES
Assistant District Attorney

---

249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

TABLE OF CONTENTS

TABLE OF CASES

STATUTES

United States Court of Appeals
FOR THE SECOND CIRCUIT

LORRAINE BERMAN,

Plaintiff-Appellant,

against

CARL A. VERGARI, DISTRICT ATTORNEY OF WESTCHESTER COUNTY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

Issue Presented

Should a Federal Court Intervene to Enjoin a State Prosecution Where the State Courts Provide an Adequate Forum for the Vindication of Constitutional Rights?

Statement of the Case

The plaintiff-appellant was indicted in August of 1974 by a Grand Jury impaneled by the County Court of Westchester County. On April 9, 1975, she moved to dismiss the indictment and in a decision and order dated May 20, 1975, the motion was denied by the County Court. On July

21, 1975, Berman moved in the United States District Court for the Southern District of New York for a preliminary injunction enjoining the District Attorney from prosecuting her, for declaratory relief and for a permanent injunction. This is an appeal by her from two orders of the United States District Court, Ward, J., one of which, dated August 18, 1975, granted the District Attorney's motion to dismiss the complaint and the other of which, dated the same day, denied her motion for a preliminary injunction.

Facts

By indictment No. 74-00652, the plaintiff-appellant was charged with the crimes of Grand Larceny in the Second Degree and a Violation of Section 366-b of the Social Services Law of the State of New York. The essence of the charges is that Berman wrongfully obtained money of the value of over $1,500.00 from the Department of Social Services on behalf of her mother, Edith M. Levy, by means of making false statements and representations and by concealing material facts concerning the existence of property and resources of Edith M. Levy (25a).

Indictment No. 74-00652 was returned by a Grand Jury impaneled by the County Court of Westchester County and the indictment was duly filed with the Court on August 15, 1974. Following her arraignment, a pre-trial motion was submitted on her behalf which sought various relief. Although the motion sought dismissal of the indictment, it is interesting to note that it was not grounded on the rationale later to be announced in *Taylor* v. *Louisiana*, 419 U.S. 522 (1975). The motion was subsequently denied in a decision and order dated February 13, 1975 (26a).

On April 9, 1975, Berman again moved to dismiss the indictment; this time, the motion was grounded on the assertion that the ". . . grand jury which handed up the

indictment was unconstitutionally impaneled, and on the grounds that the state statute providing for such impaneling was invalid as applied by reason of its repugnancy to both the Sixth and Fourteenth Amendments to the United States Constitution and cases decided thereunder . . ." (cf. 11a). In a decision and order dated May 20, 1975, the Westchester County Court denied the motion (14a) noting, *inter alia,* that the holding in *Taylor* was not to be applied retroactively [*Daniel* v. *Louisiana,* 420 U.S. 31 (1975)]. Subsequent thereto, indictment 74-00652 was transferred to the Criminal Term of the Supreme Court of the State of New York for the County of Westchester where it remains pending.

In July of this year, Berman moved in United States District Court for the Southern District of New York to enjoin the District Attorney of Westchester County from prosecuting her under indictment 74-00652. The District Attorney then moved to dismiss the complaint. In so doing, the District Attorney argued that there had been no showing that the State prosecution was undertaken in bad faith or that any efforts had been made to harass or intimidate the plaintiff Berman. Further, it was argued that the State Courts provided an adequate forum for the vindication of Berman's constitutional rights (Criminal Procedure Law, § 450.10).[1]

---

[1] CPL § 450.10 provides that,

"An appeal to an intermediate appellate court may be taken as of right by the defendant from the following judgment, sentence and order of a criminal court:

1. A judgment other than one including a sentence of death;
2. A sentence other than one of death, as prescribed in subdivision one of section 450.30;
3. An order, entered pursuant to section 440.40, setting aside a sentence other than one of death, upon motion of the People."

On August 18, 1975, the District Court, Ward, J., granted the District Attorney's motion to dismiss the complaint and denied Berman's motion for a preliminary injunction.

The District Court Was Correct in Granting the District Attorney's Motion to Dismiss the Complaint

The power of the Federal Courts to enjoin a proceeding in the State Courts is, under 28 U.S.C. 2283, limited to where ". . . expressly authorized by Act of Congress, or where necessary in aid of jurisdiction, or to protect or effectuate its judgments." In addition, a judicial exception has also been made where a person about to be prosecuted in a state court can show that he will, if the proceeding in the state court is not enjoined, suffer irreparable damages (*Younger* v. *Harris,* 401 U.S. 37, 43). The primary sources of this policy of restraint are two in number. One is the basic doctrine of equity jurisprudence that " . . . courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief" (*Younger* v. *Harris supra,* 43-44). The other is the notion of "comity," the belief that the nation will fare well if the states are permitted to perform their functions in their own ways.

And thus, cognizant of these considerations, it has become increasingly clear that it is the policy of the Federal Courts, when asked to enjoin state proceedings, not to do so. If an injunction is to issue, irreparable injury must be shown. But, as the Supreme Court noted in *Younger, supra,* even irreparable injury is insufficient unless it is "both great and immediate" (401 U.S. at 46). "Injury" related to or caused by the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution

is not to be considered "irreparable." Instead, "the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution" [*Younger, supra,* 401 U.S. at 46, citing, e.g., *Ex Parte Young,* 209 U.S. 123, 145-147 (1908)]. In this regard, the Supreme Court has held that federal injunctions shou'd not be granted even if the state statutes involved are unconstitutional, provided, of course, that the state courts provide an adequate forum for the challenge to those statutes (see, e.g., *Watson* v. *Buck,* 313 U.S. 387).

Other circumstances in which a Federal injunction may issue include those circumstances where there is a showing of bad faith and harassment or where the state statute involved is flagrantly and patently violative of express constitutional prohibitions (*Mitchum* v. *Foster,* 407 U.S. 225, 230). Even in the latter case, it is unclear whether an injunction should issue (*Perez* v. *Ledesma,* 401 U.S. 82, 85), for it has been held that the possible unconstitutionality of a statute "on its face" does not in itself justify an injunction against good faith attempts to enforce it (*Younger, supra,* 401 U.S. at 54).

In the instant case there has been no showing of bad faith on the part of the District Attorney nor any allegation that the single prosecution here involved was instituted for the purpose of harassing the appellant. Further, there is no allegation that the alleged threat to Berman's rights cannot be eliminated by her defense of the criminal prosecution nor is there a showing that the state courts will not provide an adequate forum within which to present her claim. The only harm which the appellant alleges is that which is incidental to the defense of a criminal prosecution and thus is not the irreparable harm the Supreme Court spoke of when discussing the circumstances under which an injunction might lie.

Berman attempts to come within one of the "exceptions" to the general rule that an injunction will not issue to

enjoin a criminal prosecution when she argues that Section 665(7) of the New York Judiciary Law is "flagrantly and patently violative of express constitutional prohibitions." This argument must fail, however, for there has been no determination made, either by the New York Court of Appeals or the Supreme Court of the United States, with respect to the constitutionality of that section. And thus the possible unconstitutionality of the statute "on its face" cannot serve to justify federal intervention.

Parenthetically, it should be noted that Berman's arguments with respect to the holding of *Taylor* v. *Louisiana* are misconceived. *Taylor* spoke strictly in terms of petit juries; if it can be argued that *Taylor* is also applicable to grand juries, then it must also be noted that the holding, in that regard, would not be binding on the states for the Fifth Amendment rights to a grand jury does not apply in a state prosecution (*Peters* v. *Kiff*, 407 U.S. 493, 496). Further, *Daniel* v. *Louisiana, supra,* holds that the decision in *Taylor* is not applicable to convictions obtained by petit juries prior to that decision. If, however, *Taylor* is, in fact, applicable to grand juries and binding in that regard on the states, then we must construe the decision in *Daniel* in a consistent fashion. More specifically, if we say that *Taylor* is applicable to grand juries, then we must also say that *Daniel* holds that *Taylor* does not apply retroactively to indictments returned prior to the holding in that case. And thus, it is clear, that as a matter of Federal Law, Berman's claim with respect to the applicability of *Taylor* to indictment 74-00652 must fail.

In sum, as there has been no showing of irreparable injury or bad faith and harassment on the part of the state and as the plaintiff Berman has an adequate remedy at law via an appeal to the state courts, the District Court was correct in granting the District Attorney's motion to discuss the complaint.

CONCLUSION

The orders appealed from should be affirmed.

Respectfully submitted,

CARL A. VERGARI
District Attorney of Westchester County
Office and Post Office Address
County Courthouse
111 Grove Street
White Plains, New York 10601
(914) 682-2161

Submitted by:

CARL F. LODES
Assistant District Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LORRAINE BERMAN,

Plaintiff-Appellant,

against

CARL A. VERGARI, District Attorney of Westchester County,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Rose Rinella, being duly sworn, deposes and says that she is over the age of 18 years, is not a party to the action, and resides at 951 East 17th Street, Brooklyn, New York, 11230
That on December 5, 1975, she served 2 copies of Brief for Defendant-Appellee
on

SHATZKIN, COOPER, LABATON RUDOFF & BANDLER, Esqs.,
Attorneys for Plaintiff-Appellant,
235 E. 42nd Street
New York, New York.

by depositing the same, properly enclosed in a securely-sealed, post-paid wrapper, in a Branch Post Office regularly maintained by the United States Government at 350 Canal Street, Borough of Manhattan, City of New York, addressed as above shown.

Rose Rinella

Sworn to before me this
5th day of December, 1975

John V. Desposito

JOHN V. DESPOSITO
Notary Public, State of New York
No. 30-0932350
Qualified in Nassau County
Commission Expires March 30, 1977